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RECEIVED
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DEPARTMENT OF
WATER RESOURCES
via email

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

**IN THE MATTER OF ROTATION)
CREDIT IN WATER DISTRICT 34,)
BIG LOST RIVER BASIN)
)
_____)**

**SUPPLEMENTAL AND CLARIFYING
STATEMENT OF POSITION**

COMES NOW the water user in Basin 34, Mitchell D. Sorensen, acting in behalf of himself, and hereby provides a supplemental and clarifying statement of position regarding his support for the *Preliminary Order Suspending Rotation Credit in Water District 34*, issued by Deputy Director Matt Weaver, dated April 29, 2016 (hereinafter referred to as the "Preliminary Order").

BACKGROUND

On June 28 and 29, 2016 the Director of the Idaho Department of Water Resources conducted a hearing on the above captioned matter. The hearing was not concluded by the end of the second day, and the Director has subsequently issued a NOTICE OF CONTINUED HEARING scheduled for August 2, 2016, thus providing opportunity to hear from several participating water users who were not given time to present their testimony and/or evidence. During the first and second day of this hearing, water users who are opposed to the suspension of rotation credits and their legal counsel repeatedly misstated and mischaracterized the declared position of several pro se participants who support the Preliminary Order. The following statement is provided to clarify and reaffirm my supporting position of the Preliminary Order as well as the subsequent ORDER STAYING PRELIMINARY ORDER dated July 1, 2016 and the FINAL ORDER REGARDING INSTRUCTIONS TO WATER DISTRICT 34 WATERMASTER dated July 18, 2016.

SUPPLEMENTAL STATEMENT OF POSITION

This matter is centered on the SRBA memorialized General Provision 3 (GP 3) contained in the *Amended Partial Decree for General Provisions in Administrative Basin 34*. The provision states in pertinent part:

3. Water rights from the Big Lost River diverted below Mackay Dam and Reservoir may be rotated into storage with the consent of the Big Lost River Irrigation District when such practice improves the efficiency of water use.

Such rotation is subject to the following conditions and review and approval by the Director of the Idaho Department of Water Resources.

- a. Water may only be rotated into storage if it will be beneficially used at the place of use under the water right during the year in which it is stored.
- b. Rotation into storage cannot occur prior to the reasonable need for irrigation water.
- c. Rotation into storage can only occur when the water is otherwise deliverable to the place of use under the water right.
- d. The diversion rate of water rights being rotated into storage shall be included in the calculation of total combined diversion rate limitations.
- e. If the reservoir fills after water has been rotated into storage, all water in the reservoir at the time it fills becomes storage water of the Big Lost River Irrigation District.
- f. Any water stored under such rotation that is not used in the same irrigation season in which it is stored shall become storage water of the Big Lost River Irrigation District at the end of the irrigation season.
- g. When the river is connected as specified in General Provision No. 6, while a right is rotated into storage, it is subordinate to all rights diverted above Mackay Reservoir with a priority date earlier than October 1, 1936.

This general provision has been decreed by the SRBA District Court and is the law of the land as ordered. This partial decree supersedes the Department's WD 34 Rule 40.02. However, the Rule still

provides considerable guidance to the Director regarding the administration of the rotation for credit practice. Department officials have also issued some interpretative instructions to the Water District 34 Watermaster regarding the rotation practice. Director Spackman's administrative stay and instructional orders has now modified, or possibly even replaced, some of these previous Department instructions. His intentions will become clearer if any natural flow water user wishing to rotate into storage submits a written request to do so. I support all of the above orders and instructions.

The problem water users, the watermaster, the irrigation district, and the department is having with the rotation for credit General Provision No. 3 is that all relevant conditions and requirements are not being consistently adhered to and complied with. This non-compliance is creating injury to other senior and junior water rights, reducing the efficient use of available water supplies, and causing general disruption to the prior appropriation doctrine and to the proper distribution of water supplies in the Big Lost River located below the Mackay Reservoir. If water users and local officials are unable or unwilling to conform to all the necessary conditions, requirements, and instructions the practice of rotation for credit becomes unworkable and is unconstitutional as previously applied.

In an effort to preserve the practice of rotation for credit and avoid the injuries that have occurred in the years since the General Provision Partial Decree was issued, I believe it is absolutely essential to support the Director's efforts in enforcing the plain language contained in GP 3, and as needed any administrative instructions and requirements imposed upon those water users who request the rotation of their natural flows into credit. The following is my understanding of each of the general provision's existing plain language conditions and why there must be reasonable enforcement of the requirements and limitations:

- a.) The Preliminary Order correctly stated that significant volumes of unused rotation for credit water supplies were left in the Mackay Reservoir at the end of many irrigation seasons. This is in direct violation of the plain language expressed in GP 3.a. which states, *"Water may only be rotated into storage if it will be beneficially used at the place of use under the water right during the year in which it is stored."* The practice of not applying rotation credit water supplies on appurtenant lands and/or the leaving of rotation credit water in the reservoir and not using it in the current year of impoundment is a real and direct injury to other natural flow water rights and a clear assault of the prior appropriation doctrine.

b.) GP 3.b. states *"Rotation into storage cannot occur prior to the reasonable need for irrigation water."*

The Preliminary Order does not speak directly to this condition, but the subsequent instructional order to the watermaster properly seeks to enforce the condition which provides necessary limits to the rotation practice. Some natural flow water users attempt to "game the practice" by rotating into credit early in the season when they really have no need for irrigation. Their attempt to ignore this condition is a type of "water hoarding" which results in the injury of junior natural flow water users. These early season rotation supplies are usually forfeited to BLRID pursuant to condition "e." which is discussed further below. Again, when this happens it causes injury to other natural flow water rights, decreases the efficient use of available water supplies, and is a direct violation of the prior appropriation doctrine.

c.) GP 3.c. states *"Rotation into storage can only occur when the water is otherwise deliverable to the place of use under the water right"*. This condition is fraught with potential misuse by local water officials and conveyance entities. It is almost an excuse to steal water by denying water users their natural flow river supplies by declaring the canal(s) are not ready to deliver water, and then adding insult to injury by claiming the natural flow supply cannot be rotated into storage because it is non-deliverable to the canal's field headgate. I cannot help but ask a rhetorical question What is a natural flow right holder left to do..... pump his/her supplemental ground water well?

d.) The GP 3.d. condition has largely been ignored because of its limiting ramifications. Basin 34 water users often call for the practice of rotation of natural flows while the right holder continues to pump their supplemental ground water rights for the same appurtenant lands "double dipping". Double dipping because most natural flow water rights in Basin 34 contain combined limitations remarks in the WR's partial decree of those rights which limits the rate of diversion of the right when used in combination with other water rights that include ground water. The temporary impoundment into the reservoir is legally considered one diversion from the public resource and the second diversion is the pumping of a supplemental ground water right simultaneously. This results in the exceeding of the combined rate of diversion limitation for those WR(s). Provision 3.d. plainly states *"The diversion rate of water rights being rotated into storage shall be included in the calculation of total combined diversion rate limitations"*. This limiting condition simply needs to be enforced. The Preliminary Order details the [Average] annual pumping in WD 34 from 1990 to 2015 more than doubled from 47,000 AF to 102,000 AF. This increase in annual pumpage is caused in part by natural flow water users impounding those water supplies in the

Mackay Reservoir while continuing to irrigate in violation of the "combined diversion rate limitations" connected to ground water supplies because they either want to postpone the immediate use of river supplies or because the delivery of the natural flow water supplies in the canals and sub-lateral is so inefficient that water users have difficulty irrigating with the remaining portion of the natural flow which is delivered to the field headgate. I simply recommend the plain language of the condition be enforced and complied with.

e.) GP Condition 3.e. which states *"If the reservoir fills after water has been rotated into storage, all water in the reservoir at the time it fills becomes storage water of the Big Lost River Irrigation District."* actually tries to make use of a portion of the prior appropriate doctrine by applying the tenant in the law which requires water supplies be made available to the next in time appropriator when the senior user has no immediate need of the existing supply. The problem with the way this condition is practiced is that the very next in time natural flow appropriator is "skipped over" when a senior user rotates into credit for extended periods of time while the next junior appropriator is curtailed (or injured). If the temporary impoundment of natural flow into storage is extended beyond an unreasonable period of time (most crops need irrigated every 7 to 10 days, most crops grow more efficiently if irrigated on a continuous basis, and a typical hay harvesting period of time is 10 to 14 days) and the reservoir fills, the BLRID is the superfluous benefactor of satisfying their most junior WR having a 09/02/1959 priority while senior WR(s) are denied the opportunity to put the natural flow water supply to beneficial use in priority. This "gaming" practice is what makes the rotation of natural flow WR(s) into storage [with WR(s) that otherwise have no element of storage right in them] unconstitutional as applied and amounts to the gross hoarding of water out of priority. The most extreme unreasonable extended period of time a natural flow is rotated into storage occurs when the rotation supply extends into the end of the irrigation season, and will be discussed below as the subject matter in condition "f". This forfeiture of rotation credits if the reservoir fills was never intended to occur except in the most extreme weather conditions such as the irregular heavy cloud bursts of rain that can occur in the upper mountain watershed which then subsequently fills the reservoir unexpectedly making all natural flow WR(s) senior and junior available for immediate use.

f.) GP 3.f. which states *"Any water stored under such rotation that is not used in the same irrigation season in which it is stored shall become storage water of the Big Lost River Irrigation District at the end of the irrigation season."* contains two very important clauses. The first clause reaffirms what is

clearly stated in condition “a” requiring any water stored under rotation for credit to be used during the year in which it is stored. The second clause declares what is obvious. At the end of the irrigation season any water remaining in the reservoir becomes storage water for BLRID to claim pursuant to their storage WR(s). The real problem is not the language contained in the condition itself; it is in the application of the practice and the resulting obfuscation of the efficiency requirements contained in the general provision’s leading sentence. The Preliminary Order got it right when it found that “[K]eeping rotation credit in storage through the end of the irrigation season depletes the natural flow of the Big Lost River below Mackay Reservoir, thereby reducing the amount of water available for appropriation by other water users during the irrigation season.” and concluded “[T]he current practice of rotation credit in WD 34, which results in increased river depletions and leaves more than 50% of rotated water unused in the reservoir at the end of the irrigation season, does not ‘improve the efficiency of water use’ as required by General Provision 3 and Rule 40.02 of the WD 34 Rules. The common practice of leaving natural flow water unused in the reservoir at the end of the irrigation season prevents the use of natural flow water by other Big Lost River priority rights, which compromises the efficient use of the total water supply and is contrary to the optimal utilization of the resource.”

g.) This condition has been reviewed and previously interpreted by IDWR officials. As such, I offer no other opinion at this time, but reserve the right to do so if needed.

EFFICIENCY OF WATER USE REVIEW

Both General Provision No. 3 and the WD 34 Rule 40.02 expressly contain language that allows the rotation for credit practice to occur when such practice improves the efficiency of water use. Efficiency as defined in the New World Dictionary of American English is the “ability to produce a desired effect, product, etc. with a minimum of effort, expense, or waste”. In the context of the irrigation of farmlands in Basin 34, it is almost impossible to standardize a single “efficiency” regulatory requirement that consistently applies to every situation given the competitive diversity of what a water user might call beneficial use. The more appropriate standard should be the question of whether the practice violates the law or causes material injury to other water users.

On its face, the practice of rotation for credit allows an appropriator to take water out of the natural river flow and temporally impound it in the Mackay Reservoir for later use. That may be

"beneficial" or "efficient" for that particular water user, but it will always have an injurious effect on those other remaining water users who are trying to receive their immediate natural water supply from the same river source. Dividing and separating the total available water supply in a natural river channel that suffers percolation and evaporation losses will always result in less total water being available to the group of water users as a whole. This undesirable effect is accentuated when the river system has several losing and gaining reaches as does the Big Lost River, and especially when the lower reaches are experiencing difficulty in receiving delivery of water for a valid water right on a commonly administered river system.

Water users in the Big Lost River Basin understand that the lower reaches of the river may become futile in an extreme drought or late in the season of a low water year. The problem with rotation for credit is that at times this practice exacerbates the natural shortages and prematurely causes the delivery of water supplies in the lower reaches to become futile. Additionally this futile condition has, at times, been blamed on other junior users (such as ground water users) in the new paradigm of a conjunctively managed basin. Certainly the "cause and effect" of rotation for credit will be called into question as senior surface water users make delivery calls against junior ground water users.

CONCLUSION

All water users in Basin 34 are bound to this General Provision No. 3 as written, either as stipulating participants in the SRBA settlement conference, or as acquiesce non-participants. The problem is that if state and local water officials and water users do not strictly adhere to every limiting term and condition of the provision it becomes unconstitutional as applied. "Rotation for Credit" was intended to be a very narrow departure from the prior appropriation doctrine that the State of Idaho adopted in its constitution and which all other state water law is predicated. Both the Provision and the Rule contain clear and unambiguous language to ensure that this very narrow deviation from the prior appropriation doctrine is neither expanded, nor diminished. If water officials and/or water users attempt to do either, the practice must cease.

Respectfully submitted this 29th day of July, 2016.



Big Lost River Basin 34 Water User

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 29th day of July, 2016, the above SUPPLEMENTAL AND CLARIFYING STATEMENT OF POSITION was served on the following by the method indicated below.

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